

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4272 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgement?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

JP SONI

Versus

DIRECTOR OF HEALTH AND MEDICAL SERVICES & MEDICAL EDUCATION

Appearance:

MR JF SHAH for Petitioner

MR VB GARANIA, AGP for Respondents Nos.1 to 3

MR GIRISH PATEL MR KK SETHIGAR for Respondent No. 4

NO ONE HAS APPEARED FOR OTHER RESPONDENTS DESPITE
SERVICE

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 04/03/98

ORAL JUDGEMENT

1. The petitioner has come with the case that, he was initially appointed as Clerk (Helper) on a fixed pay of Rs.150/- per month, with effect from 7.1.1974, on the recommendation of the Directorate of Manpower and

Employment and Training. This appointment was given to him at the Training Centre for Removal of Educated Unemployment under the Regional Family Planning Training Centre. When the petitioner came to know that the said scheme for Removal of Educated Unemployment was going to be closed down from January 1976, he moved an application dated 8th December 1975 before the Director, Public Health Services, Ahmedabad, that he may be appointed on ad-hoc basis as Junior Clerk in Gandhinagar District subject to regularisation under the centralised recruitment scheme. This application dated 8th December 1975 has been placed on record as Annexure.A. Thereupon, an order was passed on 11th December 1975, by the Director of Health Services (Health Section) stating in paragraph 2 thereof that, the petitioner, a part time Clerk working on the establishment of the Scheme of Removal of Educated Unemployment, at Regional Family Planning Training Centre, at Ahmedabad, is temporarily appointed to officiate as Junior Clerk at Rural Family Planning Centre, at Adalej, vice Shri C.N.Raval, who had been transferred at his request by the very same order. It was further mentioned in this order dated 11th December 1975 that the petitioner's appointment as Junior Clerk was purely on temporary basis and subject to regularisation under centralised recruitment scheme, when the posts are advertised by the Collector, Gandhinagar. The petitioner should report for duty to the District Family Planning Medical Officer, at Gandhinagar. This order dated 11th December 1975 has been placed on record as Annexure.B. The petitioner states that, at his own request, he was then posted as a Computer Class-III in the State Bureau of Health Intelligence under the Additional Director (Statistics), New Civil Hospital, by order dated 10th March 1976, passed by the Director of Health and Medical Services and Medical Education (Health Section). This order dated 10th March 1976 is placed on record as Annexure.C and the order shows that the petitioner who was a retrenched part time Junior Clerk under Family Planning Scheme and who had been temporarily appointed as Junior Clerk as a stop-gap arrangement, at Rural Family Planning Centre, at Adalej, was transferred at his own cost and request and posted as Computer Class-III (Rs.260-400) in the State Bureau of Health Intelligence. He was to report for duty to the Joint Director (Statistics). The petitioner then states that, he appeared before the Departmental Selection Committee on 4.1.1978 in terms of the Director's letter dated 18th July 1977 and he goes on to state that, he did not hear anything after his appearance in the Departmental Selection Committee on 4.1.1978 and, therefore, he presumed his selection by the Committee. In support of

his presumption, the petitioner has made reference to the tentative seniority list of Computers showing the position as on 1.1.1981 published by the first respondent by his endorsement dated 11.2.1981 wherein the petitioner's name appears at Serial No. 6. According to the petitioner, the final seniority list has been published and the promotions have been accorded to the next higher post of Statistical Assistant on the basis of the tentative seniority list. It has also been alleged in paragraph 4A that the respondent Directorate had issued a circular on 22nd April 1983 whereby the seniority list of the Computers was published and in this final seniority list, his name was shown at Serial No.16. The petitioner submitted his objections vide his letter dated 28th April 1983 against the assignment of seniority to him at Serial No.16. But the final seniority list was published on 18th June 1983 in which the petitioner's name was again shown at Serial No.16 with a mention that all those who may be appointed hereafter as Computers will be treated as senior to the petitioner till such time as the petitioner is selected by the Departmental Selection Committee. The petitioner has also stated that, he has a clean record of service, there is no adverse remarks in his annual Confidential Reports, the petitioner had been serving in the Department of Public Health continuously since July 1974 and enjoyed the cadre of Computers since 18th March 1976, he fulfills the eligibility and criteria for promotion to the higher post of Statistical Assistant, nay, he was asked to hold the additional charge of the post of Statistical Assistant against the leave vacancy of one Shri A.R. Sosa and in fact, he held the additional charge of the post of Statistical Assistant from 1.2.1982 to 28.2.1982, and he was sanctioned additional remuneration for holding the additional charge. The petitioner then states that there are about 13 vacancies in the cadre of Statistical Assistants and the respondent no.2 decided to fill up eight posts by direct recruitment and four posts by promotion in terms of the ratio prescribed by the rules. The process of selection had already been completed and the orders of appointment of direct recruits are likely to be issued. The list of Computers to be promoted as Statistical Assistants had also been finalised and the promotion orders were likely to be issued, whereat his juniors are likely to be promoted as Statistical Assistants.

2. Thus, with the grievances as aforesaid in the matters of assignment of seniority to the petitioner as Computer and the promotion to the post of Statistical Assistant, this Special Civil Application was filed

before this Court, on 8th October 1982.

3. Rule was issued on 14th December 1982 and thereafter when the matter came up before the Court on 28th March 1983, a statement was made by the learned Counsel for the respondents nos.1 to 3 that, final seniority list will be issued within two weeks. A request was made on behalf of the petitioner that the petitioner may be provisionally promoted as Statistical Assistant. The Court directed the respondents nos.1 and 2 to promote the petitioner as Statistical Assistant on or before 2.4.1983, taking note of the fact that his name in the seniority list dated 11.2.1 as on 1.1.1981 was at Serial No.6 and those at Serial Nos.7 to 10 had already been promoted and further that there was a vacancy. It was also mentioned by the Court that this appointment will be subject to the finalisation of the seniority list and the result of this petition and further that the seniority list shall not operate for 10 days even after finalisation so as to enable the petitioner to take appropriate action in connection with the said final seniority list and a copy of the seniority list shall be produced before this Court. Thereafter, on 20th April 1983, it has been recorded by the Court that the seniority list in respect of the cadre of Computers (Rs.260-400) as on 1st January 1981 had been prepared and the seniority list has been described as final list, but in the circular dated 22nd April 1983, it was mentioned that, the incumbents could raise the objections before 30th April 1983. In this list, the petitioner's name was shown at Serial No.16 and he too had filed the objections against the placement of his name at Serial No.16 in this final seniority list. The Court observed that, in view of the mention made in the circular dated 22nd April 1983, the Court's order dated 28th March 1983 cannot be said to be fully complied with, the Department was then directed to produce the final seniority list on or before 20.6.1983, with the order that, in the meantime, the petitioner's promotion will not be adversely affected, on the basis of the so-called final seniority list. It may be pointed out that, after the Court's order dated 28th March 1983, the petitioner was promoted as Statistical Assistant on 31st March 1983, as has been given out by Mr.Shah. Copy of that order has been placed on record and it has also been given out that the petitioner is yet continuing as Statistical Assistant.

4. The respondents have filed an affidavit-in-reply dated 26th November 1982, in the first instance, seeking to traverse the petitioner's claim and taking a categorical stand that the petitioner had no regular

appointment even as a Junior Clerk and his posting as Computer was only a temporary arrangement. The seniority assigned to the petitioner in the list of Computers was simply based on the date of his joining as Computer, that the representations had been received by the persons from the cadre of Computers that the petitioner's seniority in the Computers should be fixed only subject to his regularisation. The availability of 13 vacancies on the post of Statistical Assistants was admitted and it was given out that, eight out of these 13 vacancies were to be filled by direct selection and five by promotion. Thereafter, a further affidavit dated 14th March 1983 was filed by the Additional Director of Health and Medical Services and Medical Education, under the signature of Shri T.K.Trivedi and in this affidavit, it was mentioned in paragraph 5 that, the petitioner had not been regularised through any Selection Committee either as Junior Clerk or as Computer and hence he had to appear before the Selection Committee for Computers and further that, had the petitioner been a regular Clerk through centralised recruitment scheme, he could have been treated as regular Computer, but he failed to fulfil that condition and, therefore, he has to appear before the Selection Committee for the post of Computer. In paragraph 7, it has been stated that the petitioner had appeared before the Departmental Selection Committee on 5.1.1978, but was not selected and was placed in Grade-D. A further affidavit-in-reply dated 27th January 1997 has been filed under the signature of one Shri P.S. Pandya, Deputy Director (Statistics), in the Directorate of Health, Medical Services and Medical Education (Health Section) and it has been stated therein that, on 31st July 1996, when the matter came up before the Court, an order was passed by the Court, directing the respondents to call for the Departmental Selection Committee and also directing the petitioner to appear before the same and the services of the petitioner were to be continued or discontinued subject to the final outcome of the Departmental Selection Committee. After the Court's direction dated 31st July 1996, as aforesaid, the matter came up before the Court on 26th August 1996 and on this date, six weeks' further time has granted for compliance of the Court's order dated 31st July 1996. The Departmental Selection Committee then met, the petitioner appeared before the Committee and the Departmental Selection Committee placed its recommendation in a sealed cover which was produced before the Court and on the opening of the sealed cover, it was found that the petitioner had been cleared in this Selection and the ultimate stand of the respondents, as stated in this further affidavit-in-reply dated 27th January 1997 is

that the decision had been taken to regularise the services of the petitioner on the post of Computer, with effect from 30th September 1996. There is a further affidavit-in-reply dated 20th September 1997 in which it has been given out that the selections were held in past on 5th January 1978, 2nd December 1978, 7th January 1980 and 20th January 1982. The petitioner was not selected in the selection held on 5.1.1978. In the subsequent Departmental Selection Committees, the petitioner did not appear. The averments in detail have been made in this regard at page no.4 of this further affidavit-in-reply dated 20th September 1997. A further rejoinder affidavit dated 7th October 1997 has been filed by the petitioner and with regard to his non-appearance in the selections, all that has been stated is that, he had no knowledge about the dates of the interviews and although 18 appointments were made between 5.1.1978 and 20th January 1982 on the post of Computers, the petitioner was not relieved or sent back as Clerk.

5. The learned Counsel for the petitioner has argued that, whereas his appointment has been regularised by the Selection Committee which met on 30th September 1996, he is entitled to seniority as Computer from the date of his working as Computer. While he is holding the post of Statistical Assistant since 29th March 1983 and, therefore, his status as Statistical Assistant should also be protected.

6. I called upon the learned Assistant Govt. Pleader as to what is the position of Rules with regard to the appointment on the post of Computers and all that has been done is that, a notification dated 3th August 1976 has been produced which contains the Computer (Public Health and Medical Departments) Recruitment Rules, 1976. It has not been made clear as to what was the position of Rules with regard to the appointment on the post of Computers prior to 3rd August 1976. So far as the Rules notified on 3rd August 1976 are concerned, it is provided in the Rules that, appointment to the post of Computers in the subordinate services of the Public Health and Medical Departments, shall be made by direct selection and to be eligible for regular appointment through direct selection, the selected candidates shall be required to pass the Departmental examination and the examination in Gujarati or Hindi or both, in accordance with the Rules prescribed by the Government from time to time.

7. The long and short of the factual position is that:

- (i) The petitioner neither possessed a regular appointment as Clerk nor as Computer.
- (ii) The Rules with regard to the appointment on the post of the Computers were notified on 3.8.1976.
- (iii) The petitioner was given the posting as Computer, Class-III by order dated 10th March 1976 on which post, he joined on 18th March 1976, i.e. prior to the notification dated 3rd August 1976 by which Rules with regard to the recruitment on the post of Computer were notified.
- (iv) Although the petitioner did not possess the regular appointment either as Clerk or as Computer, he had appeared before the Departmental Selection Committee on 4th January 1978 for the post of Computer, but was not selected.
- (v) Although the petitioner did not possess the regular appointment as Junior Clerk or as Computer, the respondents included his name in the tentative seniority list of Computers as on 1.1.1981, at Serial No.6 as was published on 11th February 1981.
- (vi) Even while issuing the seniority list vide circular dated 22nd April 1983 published as final seniority list of Computers, the petitioner's name was included at Serial No.16, to which, the petitioner objected.
- (vii) While publishing the seniority list vide circular dated 18th June 1983, the petitioner's placement at Serial No.16 in the list of Computers was maintained with the condition that, all those who may be appointed thereafter as Computers will be treated as senior to the petitioner till such time the petitioner is selected by the Departmental Selection Committee.
- (viii) On the basis of the Court's order dated 28th March 1983, the petitioner was provisionally appointed as Statistical Assistant on 2nd April 1983. Thus, the petitioner has been working as Statistical Assistant on provisional basis since 2nd April 1983 which is a post higher than that of the Junior Clerk or Computer, without being a regularly appointed Junior Clerk/Computer.

(ix) Under the Court's order dated 31st July 1996, the petitioner's case was considered for regularisation on the post of Computer and he has been selected for regularisation on the post of Computer by the Selection Committee on 30th September 1996.

8. What has been narrated hereinabove is the factual position obtaining in this case. Now, if we examine the legal position, it becomes clear that, at the time when the petitioner was posted as Computer, there were no rules with regard to the appointment on the post of Computers and so far as the post of Junior Clerk is concerned which may be treated at par with that of Computer, the petitioner had no regular appointment even as Junior Clerk. Thus, while the petitioner has continued on the post of Computer ever since his date of joining on the said post in March 1976, he had not been selected under the Rules which were notified on 3rd August 1976. I further find that the Rules which were notified on 3rd August 1976 did not contemplate anything like regularisation of those persons who were posted as Computers prior to the notification and therefore, the regularisation on the post of Computer by way of screening or otherwise with regard to those persons who were working as Computers on the date on which the Rules were notified, has not been provided in the Rules or otherwise. The Rules notified on 3rd August 1976 provides the only mode of appointment as direct selection and nowhere the promotion is contemplated under the Rules. In this view of the matter, no appointment on the post of Computer under these Rules notified on 3rd August 1976 could be made by any mode otherwise than the direct selection after the coming into force of the Rules of 3rd August 1976.

9. In view of the factual and legal position discussed above coupled with the fact that under Court's order dated 31st July 1976, the petitioner's case was taken up for regularisation by the respondents and he has infact been selected by the Selection Committee for regularisation on 30th September 1976 and the petitioner is working as Statistical Assistant on the basis of the order dated 2nd April 1983, passed in pursuance of the Court's order dated 28th March 1983, and further that the respondents had already included the petitioner's name in the seniority list of Computers, first at Serial No.6 and thereafter at Serial No.16, although he was not holding any regular appointment as Computer or as Clerk and that the respondents in their further affidavit-in-reply dated 20th September 1997 have stated that, because of very

small compact branch, having meagre staff, the dates of the staff selection are not advertised through mass media like Newspaper or T.V. and the authorities did not think it fit to issue such advertisement, meaning thereby that, for the direct selection contemplated under the Rules of 3rd August 1976, no notice inviting applications by way of advertisement was issued, this Court is faced with a very peculiar situation. On the one hand, there is non-compliance of the Rules and on the other hand, there is an employee who has continued on a post for a period of more than 20 years without any regular appointment on any post whatsoever and yet another aspect of the matter is that, way back in the year 1983, the petitioner was promoted on provisional basis on yet higher post of Statistical Assistant on the basis of the order passed by the Court on 28th March 1983 and he has also been now selected by the Selection Committee for regularisation on the post of Computer, on 30th September 1996 on the basis of the Court's order dated 31st July 1996. It is certainly a strange situation posing an entirely new type of problem like a Pythagoras theorem and therefore, I find it to be a case wherein such a new problem calls for a new type of solution so as to synchronise the factual position obtaining for the last more than 20 years, a selection for regularisation de hors the rules, but under an order of this Court and the petitioner's continuance on yet higher post without holding a regular appointment even on the lower post and that too under an order of this Court passed on 28th March 1983 and, therefore, this Court is really faced with a great predicament more particularly when it is found that the respondents have also shown scant regard for compliance of the Rules and have not taken note of the settled position that, seniority is only a consequence of appointment. Unless a person holds a regular appointment on a particular post, there is no question of assigning seniority to him on that post and yet the respondents went to the extent of assigning seniority to the petitioner on the post of Computer, not only provisional, but even in the final seniority list and the position as to whether the name of the petitioner should have been included in the seniority list or not, was not realised even till last while the matter came up before the Court, again and again.

10. Now that the petitioner has been selected for the post of Computer by the Selection Committee on 30th September 1996 and the respondents have stated in their further affidavit-in-reply dated 20th September 1997 as under:

"In view of the facts governing the present case

and law applied, the decision for regularisation of the services of the petitioner Mr.Soni on the post of Computer is taken and he is to be regularised with effect from 31.07.1996.

I say that for regularisation of the services and fixing the date of regularisation, taking into consideration the service rules and the judgment of Hon. Supreme Court in the subject of fixing the seniority, in the case of Ashok Gulati vs. V.S. Jain and State of Gujarat vs. C.G. Desai, the respondents are of the firm opinion that the services of the petitioner on the post of Computer can be regularised in the Govt. from 31st July 1996. In other words, the date on which the Hon. High Court directed to hold the Departmental Selection Committee (DSC). I say that in my respectful submission that the order passed by this Hon.Court for holding the DSC for the petitioner as special case can be fixed as the date of regularisation of the services of the petitioner, that is 31.07.1996."

11. The limited controversy, therefore, which now remains as to from which date the petitioner is to be regularised as Computer. Obviously, the respondents have chosen 31st July 1996 to be the date for the petitioner's regularisation as Computer because, 31st July 1996, this Court (Coram: S.K.Keshote, J.) had directed to call the meeting of the Departmental Selection Committee to consider the case of the petitioner for regularisation on the post of Computer. Once the petitioner has been selected for regularisation by the Departmental Selection Committee, the regularisation cannot be made to be effective from the date on which the Court passed the order, during the pendency of this Special Civil Application. The Special Civil Application has been pending since October 1982 and merely because the Court heard the matter on 31st July 1996 and directed to consider the petitioner's case for regularisation, the effective date of regularisation cannot be related to the date of such order under which the Departmental Selection Committee was directed to consider the petitioner's case for regularisation as Computer. Such a date could very well be a date at any time after the filing of the Special Civil Application, i.e. 8th October 1982. However, the fact remains that the petitioner was not selected for the very post of Computer in the year 1978 and thereafter also, the petitioner did not appear till the selections were held in the year 1982, i.e. on 20th January 1982 and therefore, there is no question of

treating the petitioner as a regularly appointed Computer from any date prior to 20th January 1982. It is clear from the contents of further affidavit-in-reply dated 20th September 1997 at the bottom of page A4 that, even after 20th January 1982 the interviews were held on 3/4.8.83, and again on 2/3.2.84, but the petitioner did not apply or try to get himself regularised by the Departmental Selection Committee. They have stated that the selections were held for six times. The dates 3/4.8.83 and 2/3.2.84 are certainly the dates after the filing of the present petition, i.e. 8th October 1982 and, therefore, the only reasonable date after 20th January 1982 from which the petitioner can be treated to be regular Computer in view of his selection by the Departmental Selection Committee on 30th September 1996 based on the Court's direction dated 31st July 1996 would be the date on which the present petition was filed, i.e. 8th October 1982 and the relief cannot be given to the petitioner from any date prior to the date on which he approached this Court.

12. Be that as it may, a practical solution has to be found and the Court has to find some way out to strike a balance with the relief oriented approach to an employee who has continued in service for a period of more than 20 years by now and therefore appropriate directions have to be issued as the ends of justice warrants in the facts of this case on the principle that even 'LAW' has to bend before justice. Accordingly I deem it proper to direct the respondents as under:

- (i) The petitioner may be treated as a regular Computer from 8th October 1982 and no person regularly appointed as Computer prior to 8th October 1982 will be treated to be junior to the petitioner.
- (ii) The petitioner's seniority as Computer would relate back from 8th October 1982.
- (iii) Treating the petitioner to be a regularly appointed Computer from 8th October 1982, his case will be considered for further promotion to the post of Statistical Assistant from such date from which he is found to be entitled and on that basis subject to his suitability for the post of Statistical Assistant, he will be allowed to continue on the post of Statistical Assistant i.e. the post on which he has been working as such from 2nd April 1983; but even after treating him to be the regularly appointed Computer from

8th October 1982, if he is not found to be eligible or suitable for the post of Statistical Assistant appropriate order shall be issued accordingly. However, till the aforesaid exercise is undergone, the petitioner's status as Statistical Assistant on the basis of the order dated 2nd April 1983 passed in pursuance of this Court's order dated 28th March 1983 shall be maintained.

(iv) The petitioner shall be entitled to all consequential benefits.

13. This Special Civil Application is partly allowed with the directions as aforesaid. Rule is made absolute to the above extent only with no order as to costs.

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